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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

In re Cement and Concrete Antitrust Litigation
(MDL Docket No. 296)

STATE OF ARIZONA, *et al.*,

Petitioners,

—vs.—

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,

Respondent,

KAISER CEMENT & GYPSUM CORPORATION, *et al.*,

Real Parties in Interest.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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On Behalf of the Real Parties in Interest

November 1982

Question Presented

Was the Court of Appeals required to issue a writ of mandamus to compel a district judge to preside over future pretrial proceedings in this multidistrict class action after the judge recused himself under 28 U.S.C. § 455(b)(4) and Canon 3C of the Code of Judicial Conduct because his wife owned stock in plaintiff class members?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For the reasons set forth herein, the real parties in interest[1] respectfully oppose the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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1 The real parties in interest are Ash Grove Cement Co.; Citadel Cement Corp.; Columbia Cement Division of Filtrol Corporation; The Flintkote Company; Giant Portland Cement Co.; Kaiser Cement & Gypsum Corporation; Keystone Portland Cement Co.; Lehigh Portland Cement Co.; Lone Star Industries, Inc.; The Marquette

Counterstatement of the Case

In re Cement and Concrete Antitrust Litigation, MDL Dkt. No. 296, is a series of antitrust complaints against virtually all of the nation's cement manufacturers. These cases were consolidated for pretrial proceedings in the District of Arizona before Judge Carl A. Muecke. Most of these actions purport to have been brought on behalf of nationwide classes variously defined in the separate complaints. Petitioners initially sought certification in April 1977 of six nationwide classes made up largely of indirect cement users. Petitioners subsequently withdrew this request and in September 1977 filed a motion seeking certification of a single, national class of cement purchasers—a class not alleged in the original complaints. The district court first certified a "National Cement Class" on March 9, 1979, and later, at petitioners' request, modified and amended the class definition on January 15, 1980, July 16, 1980, October 20, 1980 and April 14, 1981. A Master Class List was compiled and members of the class were finally given notice in November 1980. The period for opting out of the class expired on December 31, 1980.

By letter dated January 12, 1981, the real parties in interest (defendants below) brought to Judge Muecke's attention that his 1980 Financial Disclosure Report indicated that he (and/or his wife) owned stock in a number of companies which appeared on the Master Class List and which had not opted out of the class.[2] Subsequently, Judge Muecke informed counsel

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Company; The Monarch Cement Co.; Medusa Corporation; Missouri Portland Cement Co.; Monolith Portland Cement Co.; National Gypsum Co.; OKC Corporation; Oregon Portland Cement Company; Portland Cement Co. of Utah; Universal Atlas Cement Division of United States Steel Corporation; and Whitehall Cement Company. In addition to the foregoing real parties in interest, and the additional interested parties whose names are contained on the Master Class List for the classes certified in MDL 296, which has been filed with this Court, the companies listed in Appendix I have an interest in the outcome of this case.

2 Due to the *Duplantier* litigation challenging the constitutionality of those provisions of the Ethics in Government Act requiring the public

that the Financial Disclosure Report might be out of date in certain respects. Accordingly, Judge Muecke furnished counsel updated listings, which showed that Mrs. Muecke owned stock in several companies on the Master Class List.[3]

Petitioners (plaintiffs below) served interrogatories and document requests, which established that at least seven of the companies in which Mrs. Muecke owned stock as of December 31, 1980 actually purchased cement or cement-containing products during the relevant period and were, therefore, members of the National Cement Class in accordance with the court's class certification orders. The record indicates that Mrs. Muecke had held the stock since about the time suit was filed in 1976 and that she traded in the stock during the pendency of the case. Judge Muecke candidly admitted that "the total value of the number of shares owned by [Mrs. Muecke] as it relates to [her] total financial holdings makes it of substantial importance to her." *In re Cement and Concrete Antitrust Litigation*, 515 F. Supp. 1076, 1083 (D. Ariz. 1981).

In 1974, Congress amended 28 U.S.C. § 455 to create a *per se* standard requiring recusal for a financial interest, "however small," in a party to the proceeding or in the subject matter in controversy. Courts interpreting the amended statute recognized that it mandated disqualification if the judge owned even

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filing by the judiciary of financial disclosure reports, financial disclosure reports for judges were not generally available until late 1980. *See Duplantier* v. *United States*, 606 F.2d 654, 661 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981).

3 Petitioners have noted that five Justices appear to hold stock in companies appearing on the Master Class List. This ignores the fact that the 1982 Financial Disclosure Reports are current only as of December 31, 1981. It does not follow that any Justice currently has such a shareholding. Furthermore, petitioners appear to have included in their listing at least one non-equity holding which is not a stock interest at all (*i.e.*, a debenture bond for Caterpillar Tractor listed on Justice Powell's disclosure report).

one share of stock in a party to the litigation[4] and that recusal for such stock ownership could not be waived.[5]

In light of these precedents and pursuant to the briefing schedule established by the district court, the real parties in interest filed a formal motion to recuse Judge Muecke on February 23, 1981. The motion suggested that Judge Muecke was required to recuse himself because his wife's stockholdings in class members constituted a financial interest in a "party" and in the "subject matter in controversy" within the meaning of 28 U.S.C. § 455.

After obtaining an opinion from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States concluding that recusal was appropriate, Judge Muecke held that class members are parties for purposes of 28 U.S.C. § 455(b)(4) and therefore recused himself from further participation in this case. *In re Cement and Concrete Antitrust Litigation,* 515 F. Supp. 1076 (D. Ariz. 1981).[6]

Judge Muecke recused himself because "the law [28 U.S.C. § 455], as written, says I must," 515 F. Supp. at 1078, and

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4 See *In re New Mexico Natural Gas Antitrust Litigation,* 620 F.2d 794, 796 (10th Cir. 1980).

5 See *Potashnick* v. *Port City Construction Co.,* 609 F.2d 1101, 1114-15 (5th Cir.), *cert. denied,* 449 U.S. 820 (1980).

6 Because of his holding that plaintiff class members are "parties" for purposes of 28 U.S.C. § 455(b)(4), Judge Muecke expressly did not rule on whether he had a financial interest in the "subject matter in controversy." Petitioners erroneously suggest that the Ninth Circuit decided that Judge Muecke did not have a financial interest in the "subject matter in controversy." Petition at 5 n.5. But petitioners neglect to quote the Ninth Circuit in full (material omitted by petitioners in italics): "*While we do not ultimately decide the question here,* we have no hesitation in concluding, for purposes of our mandamus analysis, that Judge Muecke was not required to recuse himself on the latter ground." *In re Cement Antitrust Litigation,* 688 F.2d 1297, 1307 n.8 (9th Cir. 1982). Thus, neither the Court of Appeals nor Judge Muecke ruled on whether the "subject in matter controversy" prong of the statute required Judge Muecke's recusal.

because "[r]egardless of the applicability of § 455, this Court is very persuaded by the Advisory Committee's conclusions as to Canon 3C [of the Code of Judicial Conduct]," *id.* at 1079.[7]

On October 1, 1982, the Ninth Circuit issued its opinion on petitioners' request for a writ of mandamus.[8] *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982). Based on a thorough analysis of the statute and its purpose, the Ninth Circuit held that Judge Muecke correctly recused himself.

> "We need not decide the general question whether class members are in fact 'parties' to a class action suit; for some purposes they are treated as such, and for other purposes they are not. Here, we need decide only if, for purposes of section 455, stock ownership in a class mem-

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7 The Advisory Committee advised Judge Muecke, inter alia, that Canon 3C "also states in effect that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including instances where he knows that his spouse has 'any other interest that could be substantially affected by the outcome of the proceeding.' " 515 F. Supp. at 1084.

8 Petitioners sought review in the Ninth Circuit of Judge Muecke's recusal decision by three avenues: they filed a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b), an appeal pursuant to 28 U.S.C. § 1291, and a petition for writ of mandamus. On October 30, 1981, the Court of Appeals entered an order denying permission to appeal pursuant to 28 U.S.C. § 1292(b), dismissing the 28 U.S.C. § 1291 appeal, and setting the petition for writ of mandamus down for oral argument. *In re Cement Antitrust Litigation*, 673 F.2d 1020 (9th Cir. 1982).

In addition to the present Petition, petitioners have filed two other petitions for writ of certiorari in this matter. The first, currently pending in this Court's docket No. 82-287, seeks review of the Ninth Circuit's October 30, 1981 dismissal of petitioners appeal of Judge Muecke's recusal decision pursuant to 28 U.S.C. § 1291 and its refusal to permit discretionary appeal of that decision pursuant to 28 U.S.C. § 1292(b). The second, a petition for prejudgment writ of certiorari of petitioners' mandamus petition to the Ninth Circuit, was dismissed by agreement of the parties after the Ninth Circuit rendered the decision which is the subject of the present Petition.

ber constitutes an interest in 'a party to the proceeding.' We agree with Judge Muecke's analysis in rejecting petitioner's argument that class members are not parties within the meaning of section 455:

> 'The problem with plaintiffs' argument is that, *where it counts,* class members and parties are identical. There is no question that class members are included in the benefits and burdens of a judgment on an equal basis with parties. For this reason, there appears to be no reason in logic why a financial interest "however small" in a named party to a litigation should be grounds for recusal, but that the same interest in a class member should not be. Neither the degree of conflict, nor the appearance of impropriety is altered by a litigant's classification as "party" or "class member." ' " *Id.* at 1310.

In deciding that for purposes of the recusal statute plaintiff class members must be treated as "parties," the Ninth Circuit looked not only to the clear language of the statute and its purpose, but also exhaustively examined its legislative history.

> "Congress adopted a broad and sweeping *per se* rule despite warnings that it might lead to major disruption of litigation and to the loss of the judge with the most expertise in a given matter, even where the judge's financial interest in the party was insubstantial. It was aware that the rule would in at least some cases create the very type of hardships that petitioners plead here. Congress weighed these hardships against the importance of public confidence in the federal judiciary and struck the balance in favor of the latter.
>
> "Given that Congress' main concern in adopting section 455 was to promote public confidence in the impartiality of the judiciary, it is entirely consistent with congressional intent to hold that a financial interest in a class member requires recusal." *Id.* at 1313.

Reasons for Denying the Writ

I. The Petition Does Not Merit Review: The Ninth Circuit Was Clearly Correct and There Is No Split in the Circuits

The instant Petition does not meet the standards for review by this Court. The Ninth Circuit's decision was clearly correct. There is no split in the Circuits; in fact, there is no contrary authority whatsoever.[9]

The Ninth Circuit, the district court, and the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States all agree that recusal was appropriate. Judge Howard Bratton of the District of New Mexico, the only other district court judge to have confronted the issue, also held recently that class members are parties for purposes of the recusal statute.[10] Indeed, it would make no sense to require automatic recusal where a judge owns only one share of stock in a named plaintiff but permit him to sit if he owns substantially more stock in some other plaintiff class member. As both the Ninth Circuit and Judge Muecke recognized, there is no

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9 Lacking any split in the circuits, petitioners are reduced to claiming that the rules of practice of this and other appellate courts do not contemplate treating plaintiff class members as parties for purposes of the recusal statute. Petitioners claim that because such rules do not separately require a master class list to be filed with the court they evidence a view "in conflict" with that articulated by the Ninth Circuit. Petition at 7-8. But, as discussed below, court rules require that parties to the proceedings and others with an interest in the outcome be identified to permit judges to evaluate possible recusal. *See* pp. 14-15, *infra*. Such rules are perfectly consistent with the Ninth Circuit's decision. In any event, rules of practice do not represent conflicting decisional authority with the Ninth Circuit's ruling, which is uncontradicted by any other judicial decision and which faithfully carries out the express intent of Congress in amending 28 U.S.C. § 455.

10 *See In re New Mexico Natural Gas Antitrust Litigation*, MDL Dkt. No. 403 (D.N.M. May 14, 1982), Opposition to Petition in No. 82-287, Appendix IV.

room under the statute for different treatment of stock ownership in named class representatives and class members because "where it counts"—*i.e.*, who wins, who loses, and how much—named class representatives and plaintiff class members are impacted identically.

Moreover, the conclusion of the Court of Appeals and the district court that 28 U.S.C. § 455 applies equally to stock interests in both named class representatives and plaintiff class members is the only acceptable result in light of this Court's decision in *United States* v. *Will*, 449 U.S. 200, 211-12 and n.11 (1980). The Court there concluded that (absent the Rule of Necessity) every Article III judge was disqualified under section 455(b)(5)(i) because as members of the class each was "a party to the proceeding." This is precisely the position advocated by the United States in its brief to the Supreme Court in *Will*. *See* Brief of Solicitor General at pp. 17-18, 25-26 ("each of the Justices of this Court is a member of the plaintiff classes certified by the district court" and subject to disqualification as "a party to the proceeding").

The unanimous view of all the courts that have considered this issue is not only compelling in logic, but also is the only view consistent with the legislative history of the recusal statute. As the Ninth Circuit recognized, Congress intentionally chose a stringent *per se* standard of disqualification for financial interest when it amended 28 U.S.C. § 455 in 1974.

Prior to 1974, section 455 required recusal by a judge "in any case in which he ha[d] a substantial interest . . . ." As might be expected, this "substantiality" standard required highly subjective decisions as to when a particular financial interest was "substantial," which led to serious after-the-fact criticism of a judge's decision to sit in a particular case where he had some financial interest.[11] As one commentator on the

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11 It was generally recognized that a judge could be "the victim of the highly ambiguous federal disqualification statute which require[d] disqualification only in cases of 'substantial' interest." Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law &

subject said in an article reprinted in the Congressional Record:

> "The defeat of Judge Clement Haynsworth, Jr., for the Supreme Court demonstrates that the federal law of disqualification of judges needs to be rewritten. As Justice Blackmun said of a shift in his own personal disqualification practice, 'The times have changed.'" Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. Probs. 43 (1970), *reprinted at* 117 Cong. Rec. 23712 (1971).

Therefore, in 1974 Congress abandoned the "substantial" standard and replaced it with an absolute *per se* standard, which prohibits a judge from sitting in a case when he has *any* financial interest[12] in a party to the proceeding or in the subject matter in controversy. In so doing, Congress sought to assure the appearance of an impartial judiciary[13] and to resolve "the

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Contemp. Probs. 43, 62 (1970), *reprinted at* 117 Cong. Rec. 23712 (1971). As an aftermath of the judicial confirmation controversies, 28 U.S.C. § 455 was amended "to bring it up to the standard applied in the Haynsworth case." *Id. See also, e.g., Judicial Disqualification: Hearings on S. 1064 Before Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1971, 1973) ("*Senate Hearings*") at 26, 28, 32, 60, 77, 117; *Judicial Disqualification: Hearings on S. 1064 Before Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 9 (1974) ("*House Hearings*").

12 The statute defines financial interest as "ownership of a legal or equitable interest, however small . . . ." 28 U.S.C. § 455(d)(4). Stock ownership is the quintessential "financial interest." See *In re New Mexico Natural Gas Antitrust Litigation, supra*, 620 F.2d at 796.

13 While the policy underlying the statutory mandate is frequently expressed in terms of whether the companies in which the judge owns stock may be viewed as benefiting from his rulings, Congress recognized that it was equally likely that a company in which the judge owned stock might be viewed as disadvantaged because the court might "lean over backwards" not to favor it. *Senate Hearings* at 43, 46; *House Hearings* at 15, 18. Thus, even where the possible financial benefit to the judge as a shareholder is not great, the company in which the judge owns stock might stand to lose a substantial amount. The design of amended 28 U.S.C. § 455 is to insure a presiding judge

dilemmas created by the loose language of [old] Section 455" which had become apparent during intensive judicial confirmation controversies. *Senate Hearings* at 24 (statement of Senator Hollings).

It is thus evident that in holding that a stock ownership interest in plaintiff class members is subject to the *per se* standard requiring recusal regardless of "substantiality," Judge Muecke and the Ninth Circuit followed the only course of action compatible with Congress' expressed intent.

II. The Purported "Administration" Problems Identified by Petitioners Offer No Reason To Disregard the Clear Mandate of Congress

Perhaps in recognition of the lack of support for their claim in the cases, statutory language, or legislative history of 28 U.S.C. § 455, petitioners make a series of arguments which do not derive from the statute but which petitioners claim are founded in general policies of efficient administration of the courts.[14] None of these arguments has merit.

A. Petitioners' Position Would Do Nothing To Alleviate the "Administration" Problems They Identify and Would Require this Court To Rewrite the Statute Enacted by Congress

Petitioners acknowledge that the Ninth Circuit was correct in analyzing the amended recusal statute in light of Congress'

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free from complaint on either ground, that is, a judge free of financial interest.

14 Petitioners also say that the issue of whether class members are "parties" for purposes of the recusal statute is present "behind the scenes" in the *Plywood* litigation. Since it appears that in *Plywood* only four individual plaintiffs (not the class) are before the Court, we doubt that this is so. But in any event this Court considers cases and controversies properly presented to it. That petitioners feel an issue may be "behind the scenes" in some other case is certainly no reason to grant certiorari in this one.

expressed intent to eliminate the need to make decisions under the ambiguous standard of whether a judge's financial interest is "substantial," but they criticize that court for not weighing what petitioners claim are two equally important considerations—"the avoidance of uncertainty in recusal matters and the disqualification of judges at the outset to minimize disruption to litigation." Petition at 11. Petitioners claim that these considerations should have led the Ninth Circuit to conclude that Congress intended stock ownership in class members to be treated under Section 455 as an "other interest," which must be substantially affected before recusal is required. Petition at 15.[15]

There are two major problems with petitioners' claims in this respect.

First, their argument is in direct conflict with the intent of Congress. Congress stated its desire to eliminate "substantiality" decisions when a judge's financial interest such as stock ownership is involved, and in so stating rejected the points petitioners raise.[16] Treating stock ownership in a class member as an "other interest" (which as noted requires recusal only if "substantially" affected) would reintroduce the need for a "substantiality" determination, thereby injecting the very ambiguity which Congress expressly attempted to eliminate as to stock ownership in amending Section 455.

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15 In amended 28 U.S.C. § 455, Congress treated non-financial interests, such as a judge's customer/user relationship to an electrical utility, as "other interests" not subject to the *per se* recusal standard. *In re New Mexico Natural Gas Antitrust Litigation, supra.*

16 The Ninth Circuit in upholding Judge Muecke's recusal decision recognized that Congress

> "was aware that the rule would in at least some cases create the very hardships that petitioners plead here. Congress weighed these hardships against the importance of public confidence in the federal judiciary and struck the balance in favor of the latter." 688 F.2d at 1313.

Second, the result urged by petitioners would not in fact cure the "problems" they raise. If, as petitioners suggest, stock ownership in class members were treated as an "other interest," recusal decisions would still be subject to the uncertainties to which petitioners object since the "other interest" could not be determined until class membership was clear. Thus, neither of the considerations identified by petitioners—uncertainty in recusal matters or disqualification of judges at the outset—are advanced by treating stock ownership in a class member as an "other interest."

In essence petitioners are asking this Court to rewrite the recusal statute which Congress enacted because they claim it "disrupt[s] the orderly litigation of class actions." Petition at 11.[17] Petitioners' claim at bottom is that the standard selected by Congress for disqualification in cases of financial interest is too stringent, and they ask this Court to substitute its judgment of what the law should be.[18] But the purported "problems" with the statute about which petitioners complain have been brought to Congress' attention, and if the law is to be

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17 The instant Petition virtually ignores 28 U.S.C. § 455 and its legislative history, treating the issue as though it involved construction of Rule 23. It does not. The issue is whether a financial interest in a class member is an interest in a "party" or in the "subject matter in controversy" as those terms are used in section 455(b). The answer is clear; the Ninth Circuit and the district court are indisputably correct.

18 The Ninth Circuit rejected a similar invitation by petitioners to rewrite section 455. While the court acknowledged the possible need for "legislative evaluation" by Congress the Ninth Circuit recognized that "this fact does not affect the question whether a class member is a party for purposes of section 455, as that provision was enacted in 1974." 688 F.2d at 1315. Likewise, a newspaper article petitioners placed in the record before the Court of Appeals reports that when asked about this case, Senator Dennis DeConcini, a member of the Judiciary Committee, commented that the law should not be "so strenuous," but said that under the present law Judge Muecke was "ethically, morally, and technically correct" and that in recusing himself Judge Muecke "did the right thing." CA 9 App. Ex. 20.

changed, it is up to Congress to do so.[19] Meanwhile, because no party is entitled to any particular judge, petitioners will suffer no injury by proceeding to try their case before another judge who does not have a financial interest in a party to the proceeding or in the subject matter in controversy.

Of course, Congress may conclude that no substantive change in the statute is needed. For when all is said and done, petitioners' complaints about the purported administrative difficulties created by 28 U.S.C. § 455 appear to have far less to do with that statute than with the logistical problems created by massive, ambiguously defined class actions where classes are repeatedly restructured for plaintiffs' convenience. Yet, as everyone who has considered the recusal issue in this case has concluded, there is no basis for suggesting that the fundamental commands of 28 U.S.C. § 455 should give way to the claimed conveniences of Rule 23.

B. The Ninth Circuit's Decision Does Not Engender "Administration" Problems In Class Actions

In any event, as we discuss below, the problems cited by petitioners in this case are illusory, especially when contrasted with the central thrust of 28 U.S.C. § 455—a trial presided over by a judge free of financial interest.

1. A Judge Can Determine in a Class Action Whether To Recuse Himself

Petitioners argue that *per se* recusal should be required only where the necessity for recusal can be determined early in the litigation, as where a judge owns stock in a named party, which can be discerned from a reading of the first page of the

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19 As both the Ninth Circuit and the district court judge observed, the Judicial Conference of the United States has recently proposed to Congress that section 455 be amended. 688 F.2d at 1313; 515 F. Supp. at 1081. The Ninth Circuit pointedly observed, "The issues raised by the proposed amendment are, of course, for Congress to consider if it wishes." 688 F.2d at 1314 n.17.

complaint. Petitioners claim that in a class action a judge cannot determine at the outset whether to recuse himself because there is no way for him to determine whether he has stock holdings in a party until the class is certified, the notice sent, and the opt out period passed.[20]

But contrary to petitioners' assumptions, in determining at the outset of any case whether he has a conflict, a judge can never content himself with an examination limited to the names of the parties listed in a complaint. This much is recognized by the very sources quoted by petitioners. For example, the testimony of Professors Hall and Miller with respect to the Financial Disclosure Act specifically notes that in determining whether he has a problem requiring recusal a judge must consider the "parties *and interests*" which may be affected by the litigation. *Hearings Before Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 488-89 (1977) (emphasis supplied), quoted in Petition at 12.[21] For this very reason a number of courts have adopted rules which specifically require attorneys to specify all persons—not merely parties and not merely parties directly participating in the case—who have "an interest" in the outcome of the proceeding. For example, in the Court of Appeals for the Ninth Circuit "[t]o enable the judges of the court to evaluate possible disqualification or recusal" counsel are required to provide the court with a list "of all persons, associations of persons, firms, partnerships, or corporations that have *an interest* in the outcome of the case." Rule 13(b)(3) (formerly Rule 13(e)) of

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20 Rule 23(c)(1) itself directs that "as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained."

21 Indeed, the petitioners themselves argue that a stockholding in a class member is an "other interest" which requires recusal if it could be "substantially affected." Petition at 15. It is obvious that a determination of "other interests" which may be affected by a litigation requires an inquiry of the attorneys involved, which is exactly what Professors Hall and Miller envisaged.

the Rules of the United States Court of Appeals for the Ninth Circuit (emphasis supplied).

Exactly these inquiries can be and are made in class actions. The plaintiff's complaint in every class action contains a description of the class which the plaintiff claims to represent. A judge can as a matter of course bring the contents of his financial disclosure form to the attention of counsel for plaintiffs and defendants and ask them to notify him promptly whether, in the event that the class were to be certified, any of the companies in which he has an ownership interest would be members of the class. As a result, the court would know in short order whether it did or did not have an interest in a party or subject matter in controversy, and act accordingly.

To be sure, this procedure will not in all cases prevent a judge from discovering at some later date that he has a prohibited interest in the litigation. But that is no different in a class action than in any other case. For example, a judge who is presiding over litigation may marry only to find that the new spouse has stock in a party, or a company in which a judge has a stockholding may intervene in pending litigation, or a litigant may be acquired by a company in which a judge owns stock—all of which would require recusal after a case is underway.[22]

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22 As the Court pointed out in *Ross* v. *Houston Independent School District*, C.A. No. 1044 (S.D. Tex. June 30, 1977):

> "The primary sua sponte determination of a judge's qualification under Section 455 to sit in a case is made when the case first falls upon the judge's docket. However, the judge has a continuing duty to review the litigation and to reconsider his initial determination if there is any change of circumstances. For example, additional parties may be joined in the suit or new claims for relief may be pleaded which might require the judge's disqualification under Section 455. This judge has utilized his courtroom deputy clerk to keep abreast of the changes in the cases on his docket and to alert the judge to potential disqualification problems." Slip op. at n.16.

See also House Hearings at 16 (judge has a continuing obligation to review his investments, including contents of so-called "blind" trust).

2. Recusal in Class Action Cases Creates No Improper Disruption of Ongoing Litigation

Petitioners also contend that the Ninth Circuit's ruling would disrupt litigation at an advanced stage of the proceedings. Obviously, all other things being equal, no one, not Congress, not the Ninth Circuit, not Judge Muecke, and not the real parties in interest in this litigation, favors requiring a judge to recuse himself after the litigation is underway. But all things are not equal where a judge is called upon to rule in a case in which he has an interest, and in such cases Congress has determined that precedence is to be given to assuring a forum entirely unaffected by financial interests.

With this in mind, Congress adopted an absolute *per se* rule which does not admit of waiver, whatever the convenience of the litigants. *In re Cement Antitrust Litigation, supra,* 688 F.2d at 1311-13. *See* 28 U.S.C. § 455(e). For the same reason, Congress intentionally did away with the so-called "duty to sit" rule which, under the previous version of the statute, meant that for convenience sake "close cases involving disqualification should be resolved on the ground that the judge had a 'duty to sit.' " *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 113 (7th Cir. 1977). Thus, by amending 28 U.S.C. § 455, Congress contemplated that in future cases where a judge discovered he had a financial interest, the case would be assigned to another judge, one free of any such interest. As Senator Burdick put it, "when there are 667 Federal judges active and retired, and at a time when Congress is asked to create an additional 62 judgeships" there is simply no reason to allow a judge as to whom there is any real question regarding disqualification to preside. *Senate Hearings* at 74 (statement of Senator Burdick); *see also Senate Hearings* at 77, 114, 118; 119 Cong. Rec. 6113 (1973) (statement of Senator Burdick).[23]

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23 The wisdom of that decision is apparent in the present case because, so far as can be discerned, most other judges in the District of Arizona have no financial interests in the litigation.

Congress recognized in enacting amended section 455 that replacement judges would not be available in the Supreme Court:

Nor will the results of occasional recusals in class actions as a result of stock ownership in class members (the present case is the only one reported in the eight years since the enactment of § 455) necessarily create undue disruption. In the instant case, the delay attendant on Judge Muecke's recusal would have been minimal had petitioners not strenuously opposed all efforts to have another judge assigned. Although petitioners suggest that under the Ninth Circuit's decision the Judicial Panel on Multidistrict Litigation may be disqualified from reassigning this case, the Ninth Circuit explicitly found that the Panel can act.[24] Moreover, the Judicial Panel has at no time suggested that it is unable to act. Rather, its failure to act can be ascribed to petitioners' repeated requests that another judge not be assigned to this case.[25]

"We have more judges now . . . . We can afford a more generous standard of disqualification than might have been the case 50 years ago or at some earlier time. The one place for which that is not true is in the U.S. Supreme Court where there is no way of getting substitution. Now that is an isolated problem and it shouldn't be allowed to control the whole system . . . ." *Senate Hearings* at 118. *See also Senate Hearings* at 61.

24 The Ninth Circuit stated: "[W]e opine that stock ownership in putative class members by judges on the Judicial Panel on Multi-District Litigation does not affect the Panel's ability to transfer the present proceedings to a new judge." *In re Cement Antitrust Litigation, supra,* 673 F.2d at 1024. As the Court of Appeals found, the possible recusal of a judge from the adjudicative phases of a proceeding does not prohibit that judge from carrying out ministerial duties short of adjudication, including assigning a case to another judge, or assigning a judge to make the assignment. *Id.* at 1024-25. In fact, even after Judge Muecke recused himself, petitioners themselves successfully petitioned him to transfer the case temporarily to another judge in the District of Arizona to rule upon certain matters.

25 For example, in response to a motion to designate a judge made in the fall of 1981 to the Judicial Panel by the real parties in interest, petitioners urged the Panel not to assign another judge, claiming that to do so before the Ninth Circuit ruled would "disregard the courtesy usually afforded other Courts," "abuse traditional concepts of comity," and "possibly moo[t] the recusal issues in the Ninth Circuit." Plaintiffs' Response to Defendants' Motion for Designation of District Court Judge dated December 10, 1981, at 4-5. The Panel's brief order

Furthermore, prompt assignment of another judge in this case would not have engendered undue delay because Judge Muecke's role in the litigation, while substantial, did not make him irreplaceable. As the Ninth Circuit stated in dismissing petitioners' appeal of Judge Muecke's recusal decision:

> "While plaintiffs' assessment of Judge Muecke's effective service should not be minimized, we should not rule out the possibility that the next judge selected by the Multi-District Panel may be even more familiar with the substantive issues of the litigation, which are as yet essentially undecided, or be aware of different pretrial or trial techniques. Thus, the ultimate disposition of this case may not be appreciably delayed at all." *In re Cement Antitrust Litigation, supra,* 673 F.2d at 1025.[26]

3. Congress Has Provided Appropriate Investment Opportunities for Judges Even in Light of Massive Class Actions

Petitioners also suggest that in a class action a judge cannot "follow the House Judiciary Committee's suggestion to confine investments to companies 'not likely to become litigants in his court.' " Petition at 7. But, as the Ninth Circuit recognized,

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"defer[ring]" assignment of another judge nowhere suggested that any other principles were involved in its decision. Petition in No. 82-287 Appendix H.

26 Because Judge Muecke viewed his role in the five years the litigation was before him as supervising discovery, he made *no* substantive rulings. Thus, pending completion of discovery, Judge Muecke declined to rule on numerous jurisdictional motions; deferred consideration of *Illinois Brick* motions against numerous plaintiffs; and refused to examine statute of limitations defenses. As a result, while Judge Muecke was surely familiar with the progress of the litigation as a result of his tenure, he did not have to confront the difficult substantive or procedural issues of the case. Indeed, the only such issues which Judge Muecke considered related to certification of the classes.

to make the statute "practical enough to be liveable,"[27] Congress established a special class of equity investments—mutual funds and the like—in which judges can invest with fewer limitations. 688 F.2d at 1308. *See* 28 U.S.C. § 455(d)(4)(i)-(iv). Congress refused to go further in safeguarding judicial investment precisely because it recognized that where ease of equity investment conflicted with the principles embodied in the recusal statute, ease of investment would have to yield. *See Senate Hearings* at 80 (a judge must "accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly").

Petitioners also claim that a judge in a class action cannot control the separate financial affairs of his or her spouse. Petition at 7. To the extent that a spouse's investments are beyond the judge's control, the situation is not confined to class actions. Thus, like all of petitioners' "administration" arguments, this argument is simply that Congress should rethink the statute it has already written, not that the Ninth Circuit or the district court misapplied that statute.

III. Mandamus Is Not Appropriate To Order a Judge To Sit Where He Has Recused Himself Based on His Uncontroverted Interpretation of 28 U.S.C. § 455 and on His View of the Ethical Considerations Embodied in the Code of Judicial Conduct

Petitioners sought appellate review of Judge Muecke's interlocutory recusal decision by petitioning for a writ of mandamus and now seek reversal by this Court of the Ninth Circuit's refusal to issue such a writ. As this Court has repeatedly emphasized: "The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. . . . '[O]nly exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' " *Kerr* v. *United States District Court*, 426 U.S. 394, 402

27 *Senate Hearings* at 37.

(1976), *quoting Will* v. *United States*, 389 U.S. 90, 95 (1967). *See also Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 661 (1978).[28]

In the present case no question has even been raised that Judge Muecke acted beyond the scope of his jurisdiction or that his decision represented a usurpation of power or involved a clear abuse of discretion. Rather, petitioners sought mandamus as a means of obtaining "supervisory" review of Judge Muecke's order. However, in light of this Court's recent decisions cited above, it is highly questionable whether so-called "supervisory" mandamus is ever appropriate for review of possible errors in the interlocutory orders of lower courts, at least absent a persistent disregard of limitations imposed by the federal rules.[29] Not only has there been no suggestion of such persistent disregard by Judge Muecke, but as previously discussed, there is also no authority even remotely inconsistent with his decision.

Apart from the general inappropriateness of "supervisory" mandamus in this context, this Court has consistently held that mandamus will issue only where a petitioner's "right" to this extraordinary remedy is "clear and indisputable." *Will* v. *Calvert Fire Insurance Co.*, *supra*, 437 U.S. at 662, *quoting Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953). And, of course, no litigant has a clear and indisputable right—or for that matter any right—to a particular judge.[30]

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28 Moreover, "it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr* v. *United States District Court*, *supra*, 426 U.S. at 403.

29 Compare *Will* v. *United States*, *supra*, 389 U.S. at 104, with *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 258 (1957).

30 *In re Cement Antitrust Litigation*, *supra*, 673 F.2d at 1024; *Hampton* v. *City of Chicago*, 643 F.2d 478, 479 (7th Cir. 1981). *See also* S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973) (litigant not entitled to judge of his choice); H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5 (1974).

For these reasons, it has been held that a judge's decision to recuse himself is not subject to mandamus. *Hampton* v. *City of Chicago*, 643 F.2d 478, 480 (7th Cir. 1981).

Moreover, "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' " *Allied Chemical Corp.* v. *Daiflon, Inc., supra*, 449 U.S. at 36. Thus, whatever the general rule where a judge recuses himself, a writ of mandamus is not appropriate in the present case to overrule Judge Muecke's exercise of discretion in applying the ethical considerations of Canon 3C of the Code of Judicial Conduct.[31] Even in the unlikely event that this Court were to conclude that the Ninth Circuit and Judge Muecke were wrong on the issues relating to section 455, that would not support an order requiring Judge Muecke to sit in the face of his ethical conclusions and those of the Advisory Committee.

Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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31 See pp. 4-5 and n.7 *supra*.

APPENDIX I

In addition to the real parties in interest listed in footnote 1 of this document, and the additional interested parties whose names are contained on the Master Class List for the classes certified in MDL 296, which has been filed with this Court, the following companies have an interest in the outcome of this case.

Alpha Portland Industries, Inc.
Arkansas Cement Corp.
Arkansas-Louisiana Gas Co.
Ashland Oil, Inc.
Canada Cement La Farge
Capital Aggregates, Inc.
Centex Corp.
Coplay Cement Mfg. Co.
Crane Corp.
Cyprus Hawaiian Cement Corp.
Dundee Cement Corp.
F. Ili Buzzi S.p.A. Cementi
General Portland, Inc.
Genstar, Ltd.
H. B. Zachry Company
H. K. Porter Co.
Heidelberg Zement A.G.
Holderbank Financere Glaris, Ltd.
Ideal Basic Industries, Inc.
Louisville Cement Co.
Martin Marietta Corp.
National Cement Co., Inc.
Nevada Cement Co.
Portland Cement Association
San Antonio Portland Co.
Santee Portland Cement Corp.
Societe des Cements Francais
Societe de Anonymes des Cements Vicat
Valley Cement Industries, Inc.
Vigier Cement Ltd.
Wyandotte Cement, Inc.